ANNE GOODWIN CRUMP*
VINCENT J. CURTIS, JR.
THOMAS J. DOUGHERTY, JR.
JAMES G. ENNIS
PAUL J. FELDMAN*
RICHARD HILDRETH
EDWARD W. HUMMERS, JR.
FRANK R. JAZZO
BARRY LAMBERGMAN
PATRICIA A. MAHONEY
GEORGE PETRUTSAS
LEONARD R. RAISH
JAMES P. RILEY
MARVIN ROSENBERG
LONNA M. THOMPSON
KATHLEEN VICTORY*
HOWARD M. WEISS
*NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH
ATTORNEYS AT LAW
11th FLOOR, 1300 NORTH 17th STREET
ROSSLYN, VIRGINIA 22209

P. O. BOX 33847
WASHINGTON, D.C. 20033-0847

(703) 812-0400 · (202) 828-5700
TELECOPIER
(703) 812-0486 · (202) 828-5786

PAUL D.P. SPEARMAN
(1936-1962)
FRANK ROBERSON
(1936-1961)

RETIRED
RUSSELL ROWELL
EDWARD F. KENEHAN
ROBERT L. HEALD
FRANK U. FLETCHER

OF COUNSEL
EDWARD A. CAINE

TELECOMMUNICATIONS CONSULTANT
HON. ROBERT E. LEE

WRITER'S NUMBER
(703) 812-

May 24, 1993

Ms. Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. ~~93-25~~
DBS Public Service Obligations

Dear Ms. Searcy:

Transmitted herewith, on behalf of United States Satellite Broadcasting Company, Inc. ("USSB") is an original and 4 copies of its Comments in MM Docket No. 93-25.

Should there be any questions concerning this matter, please communicate with the undersigned.

Very truly yours,

Marvin Rosenberg

Marvin Rosenberg
Counsel for United States Satellite
Broadcasting Company, Inc.

MR:ik
Enclosures

No. of Copies rec'd 2+4
List A B C D E

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 25	)	MM Docket No. 93-25

application for a DBS authorization included the presentation of public interest programming.

Congress has now enacted Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act") which imposes public service obligations on DBS. The Notice of Proposed Rule Making in Docket No. 93-25 ("NPRM") presents many far-reaching questions as the Commission seeks to determine the specific rules it should adopt to implement Section 25 of the Cable Act. Insofar as those questions affect the DBS service authorized pursuant to

are adopted by the Commission to whoever is responsible for determining the program selection on an individual channel.

Not all channels, however, should be subject to a DBS provider's public service obligation. Rather, the type of programming presented on a particular channel should be a significant determinant. For example, on a channel devoted to a cable programming service, capacity need not be reserved for public interest programming. The rationale for the exclusion is that the programming has not been specifically tailored for DBS, and since no similar public interest programming obligation has been imposed on cable television providers, the programming on the channel is not likely to have been planned with programming responsive to the public interest programming requirement. However, where a channel is specifically programmed for DBS, the channel could provide for some amount of time to be set aside for the public interest obligation. In the latter case, whoever determines the selection of the programming on that channel on a regular basis could be delegated the responsibility to take into consideration the inclusion of public interest programming. By agreement among the latter programmers and the licensee, the placement of the public interest programming on the DBS system would be determined.

In determining the percentage of channel capacity to be required and the number of channels to which that percentage should be applied, the nascent character of DBS and the number of 24 mHz channel assigned to the DBS licensee by the Commission should be

important factors. DBS providers are making their substantial investments with obvious recognition that, as in any new business, it will take time to develop DBS into a major, successful communications system. Initially, the need will be to encourage the public to acquire the receivers necessary to view the DBS service in substantial numbers. Great flexibility in programming will be necessary in order to stimulate the public's appetite for programming so that they will purchase receivers. While USSB is highly encouraged in this regard as the result of its extensive research, nevertheless a ramp up is expected as manufacturers increase their capacity to build DBS receivers in response to consumer demands. Thus, any obligation for a percentage of capacity to be devoted to public interest programming must be minimal at the beginning. The Commission, at a future date, based on experience with the rate of growth for DBS viewership, can always review the percentage initially adopted to determine if an increase is warranted.

DBS will introduce a new digital environment which will permit viewers to select particular channels or particular programs. With compression, the number of channels on any one transponder at any one time will vary with the type of program material being presented. Thus, it is not likely that there will be a consistent number of channels regularly available over any period of time. To apply some recognizable measure, therefore, the number of 24 mHz channels assigned by the Commission to the licensee should be

multiplied by a minimum number of channels expected to be placed within a 24 mHz channel as the result of compression to determine the standard. It is expected that in most instances, 4 channels would be the minimum number of channels available as the result of compression within a 24 mHz channel.

As to the date for initial compliance with the statutory requirements in Section 25, it would appear that an appropriate date would be a fixed number of days subsequent to the Commission's release of its adopted Rules. For example, within ninety days of the effective date of the Rules, a DBS provider would be required to commence its initial presentation of some public interest programming. Thereafter, the DBS provider should be permitted to exercise its reasonable discretion in implementing additional programming to reach full compliance. As the Commission recognized in granting USSB's Petition for Declaratory Ruling[1], the first five years of operation will be the critical period. Thus, maximum flexibility must be permitted during this period.

Subsection (a) of Section 25 requires that the Commission adopt Rules to impose the requirements of Sections 312(a)(7) and 315 on DBS providers. DBS is a national service as the Commission recognizes in the NPRM[2]. It would place an unreasonable obligation on DBS providers to require a national program service to provide

---

[1] 1 FCC Rcd 977 (1986).

[2] See DBS Public Service Obligations, NPRM, 8 FCC Rcd 1589 (1993) at note 27.

reasonable access to every Federal candidate. Such a requirement could realistically result in requests for access from almost every candidate for the Senate or House of Representatives. Thus, a DBS provider should be permitted to exercise its discretion to limit the reasonable access requirement in the case of a national DBS service to candidates for national office, i.e. President and Vice President only. At a minimum, the Commission should afford DBS providers the same latitude in the exercise of good faith judgement in political programming policies that it provides to broadcasters in responding to access demands pursuant to Section 312(a)(7), Codification Report & Order, 7 FCC Rcd 678.

Moreover, equal access should only apply to those channels which the DBS licensee, within its reasonable discretion, designates as available for the messages of candidates. Most likely, these will be channels which carry advertising supported programming. Placing political candidates on channels providing advertising supported programming would serve both the candidate and the DBS provider. The candidate's message would obtain exposure on channels that are likely to have the highest viewership since they will not require a fee for the public to view, and the DBS provider also would be served by permitting the candidate's message to be inserted into a schedule where it can more readily be accommodated within the programming being presented on the channel. However, should a DBS licensee provide only subscription channels,

the licensee could then designate a particular channel on which it will place all political messages.

As the Commission points out, it would be logical to follow the policy applied to cable in the DBS service. Namely, the Section 315 obligation can be fulfilled by placing the candidate's equal opportunity message on the same channel as the initial candidate's message appeared or on a channel having comparable audience size. The Commission asks whether, as an alternative, a case by case approach should be followed. A case by case approach is likely to result in confusion, frequent complaints, and a delay in responses to candidates. Accordingly, the present policy for cable should be extended to DBS.

The Commission proposes to apply its present policies on lowest unit charge applicable to broadcasting, to DBS. As a new service, DBS is likely to pose questions that have not been faced by broadcasters in determining the lowest unit rate. Nevertheless, USSB would suggest that applying the broadcast regulations to DBS may, at least, provide some guidance to DBS providers.

USSB supports the Commission's intention to require a DBS provider to keep its political file only at its headquarters. As a national service, this makes the most sense.

Recognizing the considerable burden placed on a new service by requiring that a percentage of a DBS provider's capacity be made available for public interest programming at a reduced cost, as well as the imposition of the political broadcast rules, the

Commission suggests that no additional public interest requirements should be imposed on DBS providers. USSB concurs fully with the Commission. DBS providers will have a full plate with the necessity to establish a new service and to fulfill the statutory requirements on public interest programming. At least in the beginning years, additional requirements could be "the straw that breaks the camel's back." It would be far better to allow the new service to be established successfully and to defer the consideration of any additional requirements.

With its CONUS service area, DBS must address its programming to persons across the country rather than to limit its programming to viewers in a specific locale. Furthermore, the initial DBS satellites to be placed at 101° W.L. do not and cannot at this point in time have spot beams. Since the inclusion of spot beams would have required the use of spectrum for limited service areas and would have detracted from the amount of spectrum available to provide maximum coverage, the use of spot beams to provide locally oriented service would not be an efficient use of the spectrum. Thus, spot beams would disserve the public interest, particularly in light of the many radio and television stations and cable systems which can and do provide coverage of significant local and regional events.

As stated previously, USSB submits that the Commission should initially adopt the minimum requirement stated in the Statute of 4 percent of capacity. Furthermore, recognizing that through

compression a 24 mHz channel is expected to permit a minimum of 4 channels of service, USSB suggests that the 4 percent should be

in the number of persons able to receive DBS service so that the increase in obligation for public interest programming is related to the economic viability of the DBS service.

As stated earlier, while ultimate responsibility for compliance must rest with the DBS licensee, the DBS licensee should be permitted to delegate responsibility to the entity responsible for selecting the programming for a particular channel

whether it is a commercial or non-commercial entity. The suggested definition herein follows from Section 335(b)4(A) which provides that, in determining reasonable policies "the Commission shall take into account the non-profit character of the programming provider." If Congress intended that only non-commercial entities be considered under Section 25, it would not have been necessary for Congress to direct the Commission to consider this additional factor. Thus, educational and informational programming from

to exercise their reasonable discretion to fulfil their public interest programming obligations. DBS providers should be able to choose between programmers. Any definitions or predeterminations on entities by the Commission would by necessity have to be very broad and could not foresee every possibility. It would be better to provide latitude for a DBS provider to react to a changing program environment and to be unrestricted in determining how best to fulfil its obligations as long as the DBS provider's decisions are reasonable.

Section 335(b)(2) establishes a right in the DBS provider to utilize unused capacity that is to be committed to public interest broadcasting. As indicated above, USSB submits that a DBS licensee must be afforded an opportunity over a period of time to put into place the required public interest programming. Until such time as a programmer commences to actually program the time allotted to it by the DBS licensee in fulfillment of the public interest program obligation, the DBS licensee should be permitted to "use" or program that time.

The Commission seeks guidance with regard to the rates to be charged to program providers under the DBS program provider's public interest programming obligation. A maximum of 50 percent of direct costs is permitted by the Statute. Reflecting on USSB's earlier statements regarding the recognized difficulty to be encountered in establishing a viable DBS communications system, the maximum statutory charge of 50 percent should be permitted. All

costs of the DBS licensee other than perhaps general administration should be permitted to be included in direct costs.

Last, the Commission recognizes that public interest programming may be obtained other than through the lease of facilities to program providers. The importance of Section 25 of the Cable Act is the determination by Congress that there is a need for educational and informational programming. From whom that programming is obtained should necessarily be of lesser importance; otherwise the Cable Act would be taking capacity from DBS providers to provide it to defined entities rather than more broadly to those who have an opportunity to present the kinds of programs desired by Congress. Thus, as long as the programming is of an educational or informational nature, it should be considered in fulfillment of the statutorily mandated percentage of capacity to be devoted to public interest programming.

Conclusion

The Commission recognizes in its NPRM that there are many balances to be struck in arriving at an implementation of Section 25 of the Cable Act which will not stifle the potential for DBS. To permit DBS to achieve its potential, the initial reservation for public interest programming should be established at the minimum level permitted by the Statute, and phased in, as noted. If DBS reaches the potential which its pioneer providers foresee, it would be fair for the Commission at that time to reappraise the

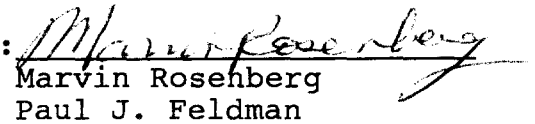
requirements to determine if any increase in obligations is warranted.

Further, to provide a measurable standard, the number of 24 mHz channels assigned to a DBS licensee should be the base to which the percentage is applied. Also, the character of the program material should be considered so that a cable channel programmer would be excluded from the base.

In its application for DBS authorization, USSB recognized its responsibility to provide public interest programming. Thus, USSB will proceed to implement the requirements of Section 25 of the Cable Act once service commences.

Respectfully submitted,

UNITED STATES SATELLITE
BROADCASTING COMPANY, INC.

By: 
Marvin Rosenberg
Paul J. Feldman

Its Attorneys

FLETCHER, HEALD & HILDRETH
11th Floor
1300 North 17th Street
Rosslyn, VA 22209

(703)812-0400

May 24, 1993
Inder#15/USSB.COM